In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1582

JOSEPH E. STEINER, JR., PETITIONER

v.

THE OFFICER IN COMMAND, ARMED FORCES EXAMINING AND INDUCTION CENTER, AT HOUSTON, TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 436 F. 2d 687.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1970, and a petition for rehearing was denied on January 18, 1971. The petition for a writ of certiorari was filed on April 14, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

425-064—71

QUESTIONS PRESENTED

1. Whether petitioner was entitled to pre-induction judicial review of his I–A classification.

2. Whether petitioner was "in custody" in the military during his pre-induction processing at the induction station, so as to entitle him to institute the instant habeas corpus proceeding.

STATEMENT

The essential facts are not in dispute. Since November 1964, petitioner has sought several deferments from induction into military service. In June 1968, after graduating from college, he requested a II–C classification on the ground he was a farmer. It was declined (App. 99).[1] In December, 1968, he applied for a III–A classification, claiming to be the sole support of his grandmother (App. 99; Pet. App. A–2). This claim was considered by his local board and denied; he was classified I–A (Pet. App. A–2). Petitioner appealed that determination to the State Appeal Board and it voted unanimously to retain him in Class I–A (Pet. App. A–2). Thereafter, petitioner notified the local board that he had incurred a physical disability and requested an appointment with the local board's medical adviser (Pet. App. A–2). The request was refused and the local board ordered him to report for induction (Pet. App. A–2).

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[1] "App." references are to the printed Appendix in the court of appeals, a copy of which is on file with the Clerk of this Court.

After receiving his induction notice, petitioner for the first time notified the board that he wished to claim exemption as a conscientious objector (App. 100). The date set for induction was then postponed so that the board could consider the claim (Pet. App. A–2). Petitioner was granted a "courtesy interview," at which he was given an opportunity to discuss his conscientious objector beliefs with members of the board (App. 100); following that interview the board, on June 4, 1969, refused to reopen his classification (Pet. App. A–2).

On July 3, 1969, petitioner appeared at the induction station in response to the order to report (Pet. App. A–2); while petitioner was being processed for induction, his attorney filed with the United States District Court for the Southern District of Texas a document entitled "Petition for Writ of Habeas Corpus, Temporary Restraining Order and Injunction." Later that day, after having been found fit to serve in the Armed Forces, petitioner refused to submit to induction (Pet. App. A–2).

Thereafter, the district court held an evidentiary hearing in petitioner's habeas corpus proceeding and then dismissed the petition "for want of jurisdiction over the subject matter (Pet. App. A–3)." On December 7, 1970, the court of appeals affirmed (Pet. App. A), and, on January 18, 1971, denied a petition for rehearing.

Criminal proceedings have now been instituted against petitioner for refusal to submit to induction; however, the present case involves only the civil suit seeking a writ of habeas corpus.

ARGUMENT

1. Petitioner contends here, as he did below, that he properly seeks habeas corpus relief because, at the time his petition was filed, he was unlawfully detained in the "custody" of the military for processing at the induction station. But, as the court below pointed out (Pet. App. A–7–A–10), mere presence at an induction center pursuant to an order by a local board is not sufficient deprivation of liberty to make habeas corpus available. See *de Rozario* v. *Commanding Officer,* 390 F. 2d 532, 535–536 (C.A. 9). Petitioner's real objection was not to his brief presence in the induction station, but rather to his potential "custody" in the Army after he was scheduled to leave the induction station; he avoided that "custody" by his refusal to submit to induction. Thus, this is not habeas corpus in the sense in which that remedy is available to test the propriety of induction. *Scaggs* v. *Larson,* 396 U.S. 1206, 1207 n. 2; *Lynch* v. *Hershey,* 208 F. 2d 523, (C.A.D.C.), certiorari denied, 347 U.S. 917; *Biron* v. *Collins,* 145 F. 2d 758, 759 (C.A. 5).[2] Rather, this is simply a suit for preinduction review, and such review is not available to test petitioner's claims.

2. The narrow exception to Section 10(b)(3), enunciated by this Court in *Oestereich* v. *Selective Service Board,* 393 U.S. 233, and *Breen* v. *Selective Service*

[2] *Ex parte Fabiani*, 105 F. Supp. 139 (E.D. Pa.), on which petitioner relies, is of questionable validity. See *Lynch* v. *Hershey*, *supra*, 208 F. 2d at 524; and see *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1238, 1258–1259 (1970).

Board, 396 U.S. 460, does not pertain where it cannot be demonstrated that action by the local board is in clear violation of its statutory mandate. There is no basis for such an assertion under the circumstances of this case.

a. Petitioner first attacks his classification on the ground that his local board was improperly constituted under Selective Service regulation 1604.52(c) (1970 Rev.), which, at the time his claim was processed, required that local board members "if at all practicable, be residents of the area in which their local board has jurisdiction." But this language did not impose a jurisdictional requirement; the only requirement as to place of residence of board members is in the statutory provision that members must "resid[e] in the county or political subdivision * * * in which the local board has jurisdiction." 50 U.S.C. App. 460(b)(3). It is undisputed that all board members were in compliance with this provision. The regulatory provision that they also reside in the same area was by its terms not absolute, but rather turned on a determination of practicability.[3]

In any event, acts of draft boards, like those of legislatures (cf. *Baker* v. *Carr,* 369 U.S. 186), "are acts of a de facto political authority." See *Clay* v. *United States,* 397 F. 2d 901, 911 (C.A. 5), vacated

[3] The area residency requirement was repealed by executive order on September 2, 1970 (Executive Order 11555, 35 Fed. Reg. No. 175, p. 14191), leaving only the statutory requirement that members of the local boards must reside in the county served by the board (50 U.S.C. App. 460(b)(3)). Consequently, the question raised here is not one of continuing legal significance requiring further review by this Court.

on other grounds *sub nom. Giordano* v. *United States,* 394 U.S. 310; *Sellers* v. *McNamara,* 398 F. 2d 893 (C.A. 5), certiorari denied, 395 U.S. 950. As such they are valid despite any irregularities in the composition of the board and are not subject to collateral attack. See *e.g., Czepil* v. *Hershey,* 425 F. 2d 251 (C.A. 7), certiorari denied, *sub nom. Czepil* v. *Tarr,* 400 U.S. 849; *United States* v. *Chaudron,* 425 F. 2d 605 (C.A. 8), certiorari denied, 400 U.S. 852; *United States* v. *Collins,* 426 F. 2d 765 (C.A. 5), certiorari denied, 400 U.S. 919.[4]

b. Petitioner next asserts that he was denied due process because the local board may have spent an insufficient amount of time considering his separate claims for exemption or deferment. Particularly, he takes issue with the procedure, followed by the local board's secretary, of placing the registrants' files before the board members in separate piles, arranged according to "kind" and "difficulty" (Pet. 9).

Petitioner assumes that, by dividing the number of cases on the calendar (1277 on December 4, 1968, when petitioner's III–A claim was denied; 780 on June 4, 1969, when petitioner's I–O claim was denied) by the time during which the board met (135 minutes; 90 minutes), no more than 6.3 seconds were spent reviewing his hardship claim and no more than 3.6 seconds were spent reviewing his conscientious objector claim.

[4] Similarly, the fact that the chairman of the local board had been serving more than 25 years, contrary to the limitation set by 32 C.F.R. 1604.52(d), is not grounds for upsetting petitioner's classification by the local board. Cf. *United States* v. *Collins, supra.*

The record, however, refutes this assumption. As the chairman of the local board testified (App. 96–97), petitioner's file had been before the board on various occasions and the members were familiar with its contents. "We have given it more time than we have most other cases," he stated (App. 96–97), "because he brought up additional information each time, and we considered it." The chairman's best recollection was that petitioner's case received approximately twenty-to-thirty minutes' board deliberation on both December 4, 1968, and June 4, 1969, as well as on other occasions (App. 97–98).

In these circumstances, petitioner's speculations on the amount of time that might have been spent by the local board reviewing his file do not warrant further consideration by this Court on pre-induction review. It is undisputed that the local board spent some time evaluating petitioner's claims, and thus the only question raised here is whether, in whatever time the board allotted to his file, a proper assessment was made on the basis of the information submitted. That is a question which the statute has reserved to the courts only "after the registrant has responded either affirmatively or negatively to an order to report for induction * * *." 50 U.S.C. App. (Supp. V) 460(b)(3). And this Court has not said anything to the contrary. *Clark* v. *Gabriel*, 393 U.S. 256.[5]

[5] Even if the local board did spend a little over 6 seconds considering petitioner's respective III–A and I–O claims—a fact belied by this record—there would be no cause here for preinduction judicial review. As to the local board's denial of the III–A claim, petitioner took an appeal to the State Appeal Board, which considered his file *de novo*, and there is nothing

c. Petitioner's claim that his conscientious objector claim was improperly processed by the local board is without merit. No request for exemption as a conscientious objector was made until after the local board had ordered petitioner to report for induction, and thus the proper forum for processing that claim was within the military after petitioner had submitted to induction. *Ehlert* v. *United States,* No. 120, this Term, decided April 21, 1971. The fact that the local board went ahead and considered the conscientious objector claim, after granting petitioner a "courtesy interview," does not take this case outside the rationale of *Ehlert,* and petitioner cannot now be heard to challenge that action.[6]

d. Finally, petitioner ascribes as error the denial

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in this record to suggest that his file was not fully reviewed on that occasion. With reference to his I–O claim, it was not submitted to the local board until after petitioner had received his induction notice; accordingly the local board was under no obligation to give that claim any consideration. See *Ehlert* v. *United States*, No. 120, this Term, decided April 21, 1971.

[6] At all events, petitioner's challenge goes only to the board's denial of a I–O classification and is thus not an appropriate subject for pre-induction review. *Clark* v. *Gabriel*, 393 U.S. 256. Contrary to petitioner's contention (Pet. 14), this aspect of his case is unlike *Hunt* v. *Selective Service Board*, C.A. 3, No. 18,076, decided February 5, 1971. *Hunt* involved a pre-notice claim, and thus raised the question whether the failure to reopen—allegedly violating the requirements set by this Court in *Mulloy* v. *United States*, 398 U.S. 410—could be reviewed in a civil suit brought prior to induction. While the Third Circuit was unable to agree on that issue in *Hunt*, a majority of the court did hold, for various other reasons, that pre-induction review was there available. But the questions raised in *Hunt* are not present in this case; indeed, Judge Adams, who voted with the majority in *Hunt*, was sitting by designation on the panel which decided the instant case and wrote the opinion.

of his claim to hardship (III–A) deferment. This contention rests solely on the mistaken premise that the local board failed to reopen his I–A classification on presentment of a *prima facie* claim. The record clearly shows, however, that the board did reopen and consider petitioner's classification anew on receipt of information that he was the sole support of his grandmother and an aging aunt.[7] Moreover, after the local board denied petitioner a III–A classification, he took an appeal to the State Appeal Board, which, after considering his file *de novo,* retained him in Class I–A (Pet. App. A–2). Consequently, there is no cause for further review of this classification question in these proceedings; if petitioner chooses, it can be properly raised in defense of the criminal prosecution now pending.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[7] Accordingly, this aspect of the case is also unlike *Hunt* v. *Selective Service Board*, *supra*, where the board refused to reopen.

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